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Subject: FW: inside EPA: Environmentalists sue EPA for approving Texas' 'affirmative' air defense

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Sent: Monday, April 13, 2020 1:35 PM
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<https://insideepa.com/daily-feed/environmentalists-sue-epa-approving-texas%E2%80%99%E2%80%98affirmative%E2%80%99-air-defense>

Environmentalists sue EPA for approving Texas' 'affirmative' air defense

April 13, 2020

Sierra Club and eight other environmentalist groups are suing EPA for approving Texas' use of an "affirmative defense" to shield industries from civil Clean Air Act liability over excess emissions during periods of facility startup, shutdown or malfunction (SSM), an approval critics say is effectively an unlawful national policy change.

In their lawsuit filed April 7 in the U.S. Court of Appeals for the District of Columbia Circuit, Sierra Club, Air Alliance Houston, Citizens for Environmental Justice, Community In-Power and Development Association, Downwinders at Risk, Environmental Integrity Project, Natural Resources Defense Council, Public Citizen, and Texas Campaign for the Environment challenge EPA's Feb. 7 decision approving Texas' affirmative defense.

EPA's Feb. 7 rule dropped a push initiated by the Obama administration to disapprove the Texas affirmative defense provisions in the state implementation plan (SIP) for Clean Air Act compliance. Texas industries can therefore continue to assert that they took reasonable steps to prevent "upset" events that result in air emissions in excess of permit limits, and avoid civil enforcement actions for such emissions.

While industry groups and some states welcome the move, environmentalists argue that in granting the Texas affirmative defense, and in proposing to approve a similar provision in North Carolina, EPA is setting a national policy but evading review in the D.C. Circuit. Under the Clean Air Act, the court has jurisdiction for policies that are "nationally applicable" or that EPA has declared have "nationwide scope or effect."

Environmentalists argue that many unplanned SSM emissions are in fact avoidable, and the SSM emissions contribute significantly to air pollution and should not be granted regulatory exemptions. In 2015, the Obama EPA issued a "SIP Call" faulting the SIPs of 36 states for their inclusion of various SSM exemptions, including affirmative defense provisions. The agency's rationale then was that D.C. Circuit rulings found affirmative defenses unlawful in federal rules, and EPA is still removing the exemptions from its regulations even now.

But former Trump EPA air chief Bill Wehrum opposed the SIP Call, arguing that the D.C. Circuit has not precluded affirmative defenses in SIPs, only in EPA regulations. The Trump EPA employed this logic to exclude Texas from the SIP Call, and effectively end litigation brought by Texas and others

over the issue. EPA relies on a 2013 ruling by the 5th Circuit that upheld the affirmative defense with respect to Texas, in *Luminant v. EPA*.

Texas and Texas-based industry groups have moved to voluntarily dismiss their consolidated D.C. Circuit cases against the 2015 SSM SIP Call with respect to Texas, in Environmental Committee of the Florida Electric Power Coordinating Group, Inc., v. EPA, et al, now that EPA has accepted the Texas affirmative defense. The case is still in abeyance pending EPA's official decision on what course to take over the SIP Call nationally.